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FEDERAL COMMUNICATIONS COMMISSION

In re Applications of:)	MM Docket No.: 97-76
)	
POSITIVE ALTERNATIVE RADIO, INC.)	File No.: BPED-290327MH
Channel 201A)	
Point Pleasant, West Virginia)	
)	
For Construction Permit for a)	
New Noncommercial Educational)	
FM Station)	
)	
THE UNIVERSITY OF WEST VIRGINIA)	File No.: BPED-921023MB
BOARD OF TRUSTEES)	
Channel 201A/Channel 201B1)	
Huntington, West Virginia)	
)	
For Modification of Facilities)	
of Station WHUL-FM)	
Huntington, West Virginia)	

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Date: March 26, 1997

HERITAGE REPORTING CORPORATION

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Huntington, West Virginia)

Courtroom 1
FCC Building
2000 L Street, N.W.
Washington, D.C.

Wednesday,
March 26, 1997

The parties met, pursuant to notice of the Judge
at 9:15 a.m.

BEFORE: HON. JUDGE STEINBERG
Administrative Law Judge

APPEARANCES:

On Behalf of the University of West Virginia
Board of Trustees:

WILLIAM D. SILVA, ESQ.
5335 Wisconsin Avenue, N.W.
Washington, D.C. 20015
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APPEARANCES CONTINUED:

On Behalf of Positive Alternative Radio, Inc.:

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Booth Freret & Tepper, PC
1233 20th Street, N.W.
Washington, D.C.
(202) 296-9100

On Behalf of the FCC Chief Mass Media Bureau:

SONIA A. GREENAWAY, ESQ.
JAMES W. SHOOK, ESQ.
Federal Communications Commission
2000 L Street, N.W.
Washington, D.C. 20554
(202) 418-2265

FEDERAL COMMUNICATIONS COMMISSION

I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
None.					

Hearing Began: 9:15 a.m.

Hearing Ended: 9:30 a.m.

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P R O C E E D I N G S

9:15 a.m.

JUDGE STEINBERG: This is a prehearing conference in MM Docket Number 97-76 involving the application of Positive Alternative Radio, Inc. for a construction permit for a new noncommercial educational FM station in Point Pleasant, West Virginia and the mutually exclusive application of the University of West Virginia Board of Trustees for modification of the facilities of noncommercial educational station WMUL FM, Huntington, West Virginia.

The case was set for hearing by hearing designation order released February 24th, 1997. By order released February 27th, 1997, the chief administrative law judge assigned the case to me and set the date of the hearing for August 12th, 1997. By order prior to prehearing conference released on March 4th, 1997, I set the intermediate procedural dates and directed counsel for the parties to meet to discuss certain matters.

Let me take the appearances first. For Positive Alternative Radio, Inc.?

MR. TEPPER: Good morning, Your Honor. Cary Tepper.

JUDGE STEINBERG: For the University of West Virginia Board of Trustees?

MR. SILVA: William Silva.

1 JUDGE STEINBERG: And for the Chief Mass Media
2 Bureau?

3 MS. GREENAWAY: Sonia Greenaway.

4 MR. SHOOK: And James Shook.

5 JUDGE STEINBERG: Okay. Let me ask whether the
6 counsel have met to discuss the matters mentioned in the
7 order prior to prehearing conference.

8 MR. TEPPER: Your Honor, we have discussed
9 settlement and discovery both through telephone
10 conversations and exchange of proposals. I circulated some
11 facsimile documents this morning. On behalf of Positive
12 Alternative Radio, we had a technical consultant look at the
13 engineering proposals of each applicant and come up with a
14 way to resolve the mutual exclusivity.

15 We shared that proposal with opposing counsel.
16 And it's my understanding that his client is currently
17 considering that and possibly seeking their own technical
18 counsel to review it. And we also came up with an outline
19 of proposed discovery should that become necessary.

20 JUDGE STEINBERG: Okay. Do you want to add
21 anything to that, Mr. Silva?

22 MR. SILVA: Well, Your Honor, I would just add
23 that Marshall University which is actually the locus of the
24 radio station is in the process of, as Mr. Tepper said,
25 retaining engineering counsel to review the proposal.

1 It's -- it takes a little bit longer because it's a state
2 school and they have to go through somewhat of a
3 bureaucracy.

4 But our goal is to try to find an engineering
5 solution to the problem if at all possible or to the mutual
6 exclusivity. And we would just ask if -- I know that you've
7 set forth a schedule already, but -- and I'm sure we can
8 meet most of those dates.

9 I can't give you a definitive date as to when this
10 process will conclude. But we are moving forward I think
11 with deliberate speed on this and hope to get back to Mr.
12 Tepper very soon.

13 JUDGE STEINBERG: Okay. The only thing I have to
14 say is the firm date is the August 12th date and the dates
15 in-between are flexible --

16 MR. SILVA: Okay.

17 JUDGE STEINBERG: -- or the dates leading up to
18 that are flexible. But I set July 1st as the preliminary
19 engineering exchange date and July 11th for completion of
20 all discovery. And this is only March, almost April. So
21 that should be plenty of time to do whatever you need to do.
22 But I do want to say that the intermediate dates are
23 flexible.

24 MR. SILVA: Thank you, Judge.

25 JUDGE STEINBERG: How about any discussion on

1 share-time arrangements?

2 MR. SILVA: Well, we really haven't discussed
3 share-time. I think the focus has been on trying to find an
4 engineering solution. I -- I just -- I think it would be
5 difficult in light of the nature of the two applicants to
6 work out a share-time. WMUL is in effect a college radio
7 station on the campus of Marshall University. And Mr.
8 Tepper's client is up the road a piece in Point Pleasant.
9 So, I mean, I'm not sure that that would be a viable
10 solution. But I -- you know, I certainly would leave it
11 open.

12 MR. TEPPER: I have discussed those matters with
13 my client, Your Honor. And as Mr. Silva indicated, the
14 programming objectives of the two clients are vastly
15 different. My client is a religious broadcaster. And
16 oftentimes, religious broadcasters find it difficult to
17 share time with broadcasters who have different formats. So
18 I don't -- I honestly don't think that's going to be a
19 possible solution. But let's progress with the discussions
20 we've had and see where they go.

21 MR. SILVA: Your Honor, the other complication
22 here is the licensee is the government -- or the state of
23 West Virginia. And, you know, that would be a -- complicate
24 things. Their format might complicate issues with the state
25 government. So that's why we've pretty much focused on

1 trying to find an engineering solution to the problem.

2 JUDGE STEINBERG: Okay. Any -- any questions on
3 the scope of the issues, Mr. Tepper?

4 MR. TEPPER: No, other than the fact that it's
5 been a long time. We've got to refresh our memories on all
6 of these. But I think Bill and I are in agreement as to
7 where we need to go.

8 JUDGE STEINBERG: Okay. Mr. Silva, any questions
9 on the scope of the issue?

10 MR. SILVA: Yes, I don't have any question in
11 particular. I -- I -- it's -- it's my understanding that at
12 this stage of the case, the -- we're going to explore the
13 307(b) issue. And if that's not dispositive, then I suppose
14 we move on to the next phase. Is that -- that's what was
15 contemplated.

16 JUDGE STEINBERG: My understanding -- Mr. Shook
17 and Ms. Greenaway, do you want --

18 MR. SHOOK: Well, the problem with that is there
19 wouldn't be a next phase at this point. We're either going
20 to resolve it under 307(b) or you're going to resolve it
21 through, you know, your engineering situation to, you know,
22 avoid the mutual exclusivity there. You know, for all
23 practical purposes, there are not any comparative criteria
24 to judge one of you against the other outside of 307(b).

25 JUDGE STEINBERG: The way I read the hearing

1 designation order is if I can make a decision based upon
2 307(b) considerations, then I'll do so. If I can't, what I
3 would plan to do is issue a partial initial decision
4 saying -- resolving or not -- actually not resolving the
5 307(b) issue, and then holding the case in abeyance until
6 the issuance of some kind of noncommercial educational
7 comparative criteria.

8 MR. SILVA: Your Honor, could I ask, is there any
9 time frame on that that counsel -- Bureau counsel could
10 share with us?

11 JUDGE STEINBERG: Oh, I don't -- if you can share.

12 MR. SHOOK: It would be entirely speculative.

13 JUDGE STEINBERG: Yes, that's what I thought.

14 MR. SHOOK: We await as well as you.

15 JUDGE STEINBERG: I -- I have the feeling it's not
16 on anybody's front burner.

17 MR. SHOOK: If you happen to have any good friends
18 in Policy and Rules, perhaps you could discover it but --

19 JUDGE STEINBERG: Okay.

20 MR. SILVA: Well, I just note that these
21 applications were filed back in '92.

22 JUDGE STEINBERG: Well, they're progressing.

23 MR. SHOOK: For better or worse, commercial
24 applicants are in the same situation.

25 JUDGE STEINBERG: Yes. Now, on -- I guess with

1 respect to discovery, you'll get to that if you can't reach
2 some kind of agreement. And I think there's -- there's
3 plenty of time in the schedule -- built into the schedule to
4 -- to do whatever discovery you need to do. I would just
5 say that if there are any disagreements during discovery,
6 that you work them out yourselves. Don't come to me unless
7 you hit an absolute brick wall.

8 I think both of you are experienced enough to know
9 what you can -- what you're entitled to and what you're not
10 entitled to. And sometimes it's better to just -- just
11 compromise your differences rather than have to -- have to
12 get a ruling from me. But so please work in good faith to
13 try to reach any kind of accommodation with respect to
14 discovery.

15 How about joint engineering? Does everybody agree
16 to joint engineering on the 307(b) issue?

17 MR. TEPPER: Yes.

18 JUDGE STEINBERG: Okay. Mr. Silva, you --

19 MR. SILVA: Yes, Your Honor.

20 JUDGE STEINBERG: Okay.

21 MR. SILVA: We would be agreeable to that.

22 JUDGE STEINBERG: Okay. That's good. What's the
23 status of publication?

24 MR. SILVA: We -- we have published -- of course,
25 we're the -- a radio -- I mean, we're on the air. So we ran

1 the notice over the air, and we'll file our certification of
2 that shortly.

3 JUDGE STEINBERG: Okay. Mr. Tepper?

4 MR. TEPPER: My client is in the process of
5 publishing. We ran into a little snag. The hearing
6 designation order that was mailed to us did not have the
7 fourth page. And although I should have realized that
8 publication was required when I went through this and
9 outlined what was required, I overlooked it. And then when
10 I got a duplicate copy and saw page 9, I immediately called
11 opposing counsel as well as Mr. Shook's office and
12 instructed my client to immediately publish. And it's being
13 done right now.

14 JUDGE STEINBERG: Okay. That's all I have on my
15 agenda. Is there anything else anybody wants to discuss?
16 Okay. Mr. Tepper?

17 MR. TEPPER: No -- no, Your Honor.

18 JUDGE STEINBERG: Mr. Silva?

19 MR. SILVA: No, Your Honor.

20 JUDGE STEINBERG: Mr. Shook?

21 MR. SHOOK: No, Your Honor.

22 JUDGE STEINBERG: Okay. Then I guess that's it.
23 And good luck on settling the case. I think it's a far
24 better alternative than going to hearing. I think everybody
25 would agree to that. If you need another conference or if

1 you need any -- any help working things out or if you want
2 an informal conference, just call me and -- and we'll
3 arrange for it.

4 MR. TEPPER: Your Honor, in the event that we do
5 reach a settlement on engineering matters, I imagine Mr.
6 Silva and I would call you and just try to coordinate how
7 you want that to be approached.

8 JUDGE STEINBERG: Well, I would -- if you work --
9 if you work out a settlement, I want you to let Mr. Shook or
10 Ms. Greenaway know --

11 MR. TEPPER: Sure.

12 JUDGE STEINBERG: -- and so that they can give it
13 to their engineers just to make sure that there's no problem
14 I -- that the Bureau can see no problem with it. And I
15 suppose then you would submit amendments and -- engineering
16 amendments.

17 The Bureau would comment on them and then when --
18 when they're accepted, when you file something to say that
19 the mutual exclusivity no longer exists, grant both
20 applications and the Bureau said, yes, grant both
21 applications, then I can grant them. I suppose that's the
22 way it will go unless you want to roll them all into one.
23 But I -- you know, check with the Bureau first so that there
24 are no surprises.

25 MR. TEPPER: Okay.

1 JUDGE STEINBERG: Okay. That's it. Thank you
2 very much for coming. I appreciate the company.

3 MR. TEPPER: Thank you.

4 JUDGE STEINBERG: We're off the record now.

5 (Whereupon, at 9:30 a.m. on Wednesday, March 26,
6 1997, the hearing adjourned.)

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REPORTER'S CERTIFICATE

FCC DOCKET NO.: 97-76
CASE TITLE: Positive Alternative Radio, et al.
HEARING DATE: March 26, 1997
LOCATION: Washington, D. C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Federal Communications Commission.

Date: 03/26/97

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I hereby certify that the proceedings and evidence were fully and accurately transcribed from the tapes and notes provided by the above named reporter in the above case before the Federal Communications Commission.

Date: 04/03/97

Bonnie Niemann
Official Transcriber
Heritage Reporting Corporation
Bonnie J. Niemann

PROOFREADER'S CERTIFICATE

I hereby certify that the transcript of the proceedings and evidence in the above referenced case that was held before the Federal Communications Commission was proofread on the date specified below.

Date: 04/04/97

Don R. Jennings
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